**UNITED STATES OF AMERICA**

**BEFORE THE**

**NATIONAL LABOR RELATIONS BOARD**

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| **CL FRANK MANAGEMENT, LLC, CL METROPOLIS MANAGEMENT, LLC, AND CL VERTIGO MANAGEMENT, LLC, A SINGLE EMPLOYER D/B/A HOTEL PROJECT GROUP D/B/A HOTEL FRANK,**<br><br>**and**<br><br>**CL FRANK MANAGEMENT, LLC, CL METROPOLIS MANAGEMENT, LLC, AND CL VERTIGO MANAGEMENT, LLC, A SINGLE EMPLOYER D/B/A HOTEL PROJECT GROUP D/B/A HOTEL METROPOLIS**<br><br>**and**<br><br>**UNITE HERE! Local 2** | Case Nos. 20-CA-35123<br>20-CA-25223<br>20-CA-35238<br>20-CA-35253<br>(Consolidated) |

**RESPONDENT'S OPPOSITION TO GENERAL COUNSEL'S MOTION TO STRIKE**

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**Dated: September 15, 2011**

## I. INTRODUCTION

Pursuant to 102.46 of the Board's Rules and Regulations, CL Frank Management, LLC d/b/a Hotel Frank, LLC and CL Metropolis Management LLC d/b/a Hotel Metropolis, LLC (collectively "Employer" or "Respondent") hereby submit this Opposition to General Counsel's Motion to Strike. On August 26, 2011, Respondent filed Exceptions ("Exceptions") and a Brief in Support of its Exceptions ("Brief") to the Administrative Law Judge's Decision ("Decision"), which Administrative Law Judge William L. Schmidt ("ALJ") issued on July 6, 2011. On September 9, 2011,[1] the General Counsel filed a Motion to Strike Respondent's Brief in Support of Exceptions to ALJ Decision ("Motion"). The General Counsel argues in her Motion that Respondent's Brief does not conform to the requirements of Section 102.46(c)(2) and (3) of the Board's Rules and Regulations. However, pursuant to case law that is directly on point in this matter, the National Labor Relations Board ("NLRB" or "Board") is compelled to deny General Counsel's Motion in its entirety and sanction her for attorney's fees.

## II. RESPONDENT'S BRIEF SUBSTANTIALLY COMPLIES WITH SECTION 102.46(C)(2) OF THE BOARD'S RULES AND REGULATIONS

The Board has long recognized that a party's brief in support of its exceptions need only substantially comply with Section 102.46(c) of the Board's Rules and Regulations. See United States Postal Service, 351 NLRB 1226, 1226 (2007). Indeed, even if a party's brief is "not in precise conformity" with Section 102.46(c), the Board maintains the discretion to still accept it. Id.; see also Solutia, Inc., 357 NLRB 1,1 FN 1 (2011) (Board denied motion to strike—which argued that the brief failed to reference the exceptions to which each argument related—because the document was in "substantial compliance with the relevant rules."); Chicago Tribune

[1] General Counsel also filed an Answering Brief to Respondent's Exceptions, to which Respondent has separately filed a Reply to the Answering Brief.

Company, 304 NLRB 495, 495 FN 1 (1991) (Board rejected motion to strike brief for failing to meet the standards of Sec. 102.46(c) contending that while the "exceptions and supporting brief did not conform in all particulars with Sec. 102.46, they [were] not so deficient as to warrant striking.")

Despite longstanding Board precedent, General Counsel fails to cite the appropriate standard for determining compliance with Section 102.46(c). Instead, she argues the Board should not accept the Employer's Brief for the mere fact that it does not specifically list the exceptions in each argument. The NLRB, however, has repeatedly rejected this contention. In fact, just two months ago, in Solutia, Inc., supra, the Board denied a motion requesting to strike a brief for failing to cite specific exceptions finding that the document substantially complied with 102.46(c). In La Gloria Oil, 337 NLRB 1120, 1120 FN 1 (2002), which is on all fours with this case, the General Counsel moved to strike the respondent's exceptions and supporting brief on that grounds that it "[did] not reference the specific exceptions addressed in each section." Id. However, the NLRB again rejected this contention finding that respondent's brief substantially complied with the rules. Id.

General Counsel's contention that, in light of Respondent's numerous exceptions, the task of discerning which exception relate to each argument is "herculean," is simply disingenuous. She filed an Answering Brief that addressed each exception, albeit insufficiently. The Employer's Exceptions and Brief follow a logical order that correspond to the ALJ's Decision. General Counsel is essentially arguing that she did not appreciate having to respond to numerous exceptions. However, Respondent is required under Section 102.46(b)(2) of the Board's Rules and Regulations to file "any exception to a ruling, finding, conclusion, or recommendation" or, otherwise, they "shall be deemed to have been waived."

## III. RESPONDENT'S BRIEF SUBSTANTIALLY COMPLIES WITH SECTION 102.46(C)(3) OF THE BOARD'S RULES AND REGULATIONS

General Counsel's contends that because Respondent allegedly failed to meet the requirements of Section 102.46(c)(2) it also, by implication, failed to comply with Section 102.46(c)(3). Her argument is both confusing and unsupported by any case law. To the extent the Employer understand her contention, it appears General Counsel maintains that if a party violates one part of Section 102.46(c) it fails to comply with each subpart. She provided absolutely no Board law in support of this position. The subsections of Section 102.46(c) are distinct and require separate analyses. Nevertheless, as discussed above, the Employer substantially complied with Section 102.46(c)(2) of the Board's Rules and Regulations and, thus, her argument is without merit.

General Counsel also argues that the purpose of Section 102.46(c)(3) is to explain "what is being taken exception to and why" and that Respondent allegedly failed to do so in this case. Assuming *arguendo* her interpretation of Section 102.46(c)(3) is correct—she provides absolutely no law in support her contention—the Employer substantially explained the "what" and "why" in this matter. As discussed above, Respondent clearly explained in its Exceptions and Brief "what" it was appealing. The Employer also sufficiently explained "why" it was excepting to the ALJ's decision in each argument asserted in its Brief. For example, Respondent excepted to the "ALJ's failure to refer to, recognize or weigh the uncontroverted record evidence that [Charging Party's] performance was substandard. (D. 29:30-30:30)." (Exception no. 137)[2] It then explained "why" it was excepting to this issue in its Brief. (See RB 12-13, 16-17)

General Counsel, however, argues that Respondent's Brief "is little more than a

2 "(RB. ___)" references Respondent's Brief in Support of its Exceptions to the ALJ's Decision; "(D.___)" references the ALJ's Decision; "(Exception ___)" references Respondent's Exceptions to the ALJ's Decision; "(PHB ____)" references Respondent's Post-Hearing Brief.

condensed version of its original ALJ brief" and, thus, failed to comply with Section 102.46(c)(3). The Employer is unaware of any case law prohibiting a party from asserting in its exceptions the same arguments used in its post-hearing brief. To the contrary, the Board specifically rejected this contention in Horizon Contract Glazing, Inc., 353 NLRB 1094, 1094 FN 2 (2009). In that case, General Counsel filed a motion to strike respondent's exceptions on the grounds that it simply repeated the arguments it made in its post-hearing brief and did not comply with Section 102.46(c), similar to the present case.[3] The Board rejected the General Counsel's motion arguing that respondent had substantially complied with the rules. The NLRB should make the exact same finding here.

In any event, the Employer did not simply regurgitate its post-hearing brief. It presented several new contentions for the Board's consideration. For example, Respondent excepted to the ALJs' finding that it "warned [Charging Party] that his protected training session comments could threaten his employment. (D.28:39-40)." (Exception 116) More specifically, the ALJ found that the Employer threatened to fire Charging Party if he was "not on the same" page and continued engaging in protected, concerted activities. Respondent, of course, excepted to the ALJ's credibility finding. (RB 15) However, in the alternative, it also presented an entirely new argument that even assuming the NLRB upholds the ALJ's credibility resolution, Respondent's statement was not evidence of anti-union animus, but rather, a reminder to the Charging Party that he was required to follow the Employer's established job standards. (RB 15)

General Counsel's further contention that Respondent "rarely" cited to the ALJ's Decision in its Exceptions and Brief is intentionally misleading. Every one of Respondent's

[3] Horizon Contract Glazing involved an employer's application for relief under the Equal Access to Justice. However, the NLRB analyzed the employer's brief in support of its exceptions to the administrative law judge's decision under Section 102.46(c), which makes this case applicable to the present matter.

Exceptions identifies the part of the ALJ's Decision it appeals by precise line and page number. Respondent's Brief also cites to the ALJ's Decision more than 60 times.

## IV. The Board Law Cited By General Counsel Is Inapposite.

The Board law cited by General Counsel is irrelevant to deciding this Motion. As General Counsel acknowledges, all of the cases she cites pertain to Section 102.46(b), which has nothing to do with briefs filed in support of exceptions. Indeed, Section 102.46(b) specifically involves exceptions wherein a brief is not filed. Respondent is completely befuddled why General Counsel would rely on case law that does not deal with any part of her argument. To suggest that they are analogous to the present situation—and to completely ignore the abundance of case law in this area—suggests that General Counsel put little effort into this Motion and brought this action in bad faith to harass the Employer.

## V. GENERAL COUNSEL SHOULD BE ESTOPPED FROM OBJECTING TO PRACTICES WHICH IT, AS WELL AS OTHERS, COMMONALY UTILIZE. ACCORDINGLY, SHE SHOULD BE SANCTIONED FOR ATTORNEY'S FEES

General Counsel for Region 20 should be stopped from bringing this motion because its office has also filed briefs in support of exceptions in a format identical to Respondent's. Respondent requests that the Board take judicial notice of Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideo Memorial Hospital, case no. 20-CA-33521 et al., wherein General Counsel for Region 20 filed Exceptions and a Brief in Support of its Exceptions in a manner exactly as Respondent.[4] (A copy of the General Counsel's Exceptions and Brief in Support of its Exception in Fremont Medical Center is attached as Exhibit A.) For General Counsel to now bring this motion is simply disingenuous.

Indeed, the Board has long recognized and accepted the practice of labor attorneys filing

[4] Respondent understands this case is still sitting before the Board awaiting final resolution.

and responding to briefs in support of exceptions drafted in the same manner as Respondent. General Counsel is essentially asking the Board to completely change the standard of practice for filing briefs in support of exceptions.

Moreover, General Counsel's intentional failure to cite any applicable case law—of which there is an abundance—demonstrates that she brought this Motion purely in bad faith. Indeed, Rule 3.3(a)(2) of the ABA Model Rules of Professional Conduct finds that an attorney engages in an unethical lack of candor to the court when she knowingly "fail[s] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." That is the case in the present matter.

In short, General Counsel's Motion is contrary to its own past practices, the widespread practice of labor attorneys, established Board precedent, and is completely unsupported by relevant case law. The Board is compelled to deny General Counsel's Motion and award the Employer attorneys' fees and expenses pursuant to Section 102.145 of the Board's Rules and Regulations for having to defend against this frivolous motion.

## VI. IN THE UNLIKELY EVENT THE BOARD GRANTS GENERAL COUNSEL'S MOTION, THE BOARD SHOULD GRANT RESPONDENT LEAVE TO AMEND ITS EXCEPTIONS AND BRIEF IN SUPPORT OF ITS EXCEPTIONS

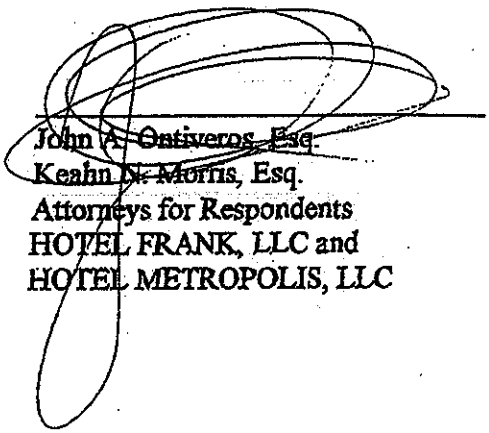
In the unlikely event the Board grants General Counsel's Motion, the Board should allow Respondent an opportunity to resubmit its Exceptions and Brief in Support of Its Exceptions. Indeed, "the Board's general policy is to provide the filing party an opportunity to resubmit the noncompliant documents in a form that comports with the Board's Rules." Hotel del Coronado, 344 NLRB 360. 360 (2005).

## VII. CONCLUSION

Based upon the foregoing, the Employer requests the Board deny General Counsel's Motion in its entirety and award attorney's fees.

Respectfully submitted this 23rd day of September, 2011.

JACKSON LEWIS LLP

BY: 

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4841-1481-9338, v. 1

# EXHIBIT A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT
MEMORIAL HOSPITAL

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT-
RIDEOUT HOME HEALTH

and

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

20-CA-33521
20-CA-33649
20-CA-33801
20-CA-34017

GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The General Counsel hereby takes exception to the following portions of the Administrative Law Judge's decision (hereinafter "ALJ" and "ALJD") dated January 29, 2009.

1. The ALJ's failure to find that Fremont-Rideout Health Group's (hereinafter "Respondent) decision to repromulgate its unenforced policy prohibiting non-employee access to break rooms and hallways in September 2007, was in response to increased efforts by the California Nurses Association (hereinafter "Union") to secure a collective-bargaining agreement. ALJD 12, l. 39 to 13: l. 2.[1]

[1] References to the ALJD are noted as "ALJD" followed by page number and line number. References to the transcript are noted as "Tr.____," and references to General Counsel Exhibits are noted as "GC Exh. ____."

2. The ALJ's application of *Guard Publishing Co. dba Register Guard.*, 351 NLRB 1110 (2007), to the allegation that Respondent repromulgated its unenforced policy prohibiting non-employee access to break rooms and hallways, where the repromulgation of the rule was based upon the Union's increased activity to secure a collective-bargaining agreement; and his resultant failure to find a violation of Section 8(a)(1) of the Act. ALJD 13: ll. 7-11.

3. The ALJ's application of *Register Guard, supra,* to the allegation that Respondent discriminatorily applied its no-solicitation/no-distribution rule to union solicitation engaged in by Nurse Katherine Zubal in April 2008; and his resultant failure to find a violation of Section 8(a)(1) of the Act. ALJD 5: ll. 47-52.

4. The ALJ's application of *Register Guard, supra,* to the allegation that Respondent discriminatorily applied its no-solicitation/no distribution rule to union solicitations and distributions engaged in by Nurse Heather Avalos and Nurse Tami Clark in June 2008; and his resultant failure to find a violation of Section 8(a)(1) of the Act. ALJD 7: ll. 1-5.

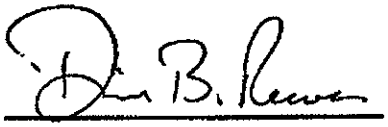
5. The ALJ's application of *Register Guard, supra,* to the allegation that Respondent discriminatorily applied its no-solicitation/no distribution rule to union solicitations and distributions engaged in by Nurse Roxann Moritz in August 2007; and his resultant failure to find a violation of Section 8(a)(1) of the Act. ALJD 8: ll. 10-12.

6. The ALJ's application of *Register Guard, supra,* to the allegation that Respondent discriminatorily issued written warnings to Nurses Avalos and Clark in violation of Section 8(a)(3) of the Act in June 2007; and his resultant failure to find a violation of Section 8(a)(3) of the Act.

7. The ALJ's conclusion that evidence of union animus was necessary to find a violation of Section 8(a)(3) of the Act regarding the discipline issued to Nurses Avalos and Clark in June

2007, where direct evidence established that Respondent issued the discipline because of their union activity. ALJD 7: ll. 24-29.

Dated at San Francisco, California, this 19th day of March, 2009.



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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT
MEDICAL CENTER AND RIDEOUT
MEMORIAL HOSPITAL

THE FREMONT-RIDEOUT
HEALTH GROUP d/b/a FREMONT-
RIDEOUT HOME HEALTH

and

CALIFORNIA NURSES
ASSOCIATION, AFL-CIO

20-CA-33521
20-CA-33649
20-CA-33801
20-CA-34017

# GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONSTO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

## I. INTRODUCTION

In the Consolidated Complaint herein, General Counsel alleged that Fremont-Rideout Health Group ("Respondent"), engaged in various violations of Sections 8(a)(1), (3) and (5) of the Act in 2007 and early 2008 after the California Nurses Association ("Union") had been certified as the exclusive bargaining representative of the Registered Nurses employed by Respondent at its facilities located in Marysville and Yuba City, California. These matters were heard on four days in August and September, 2008, before Administrative Law Judge John J. McCarrick ("ALJ") in Sacramento, California.

On January 29, 2009, the ALJ issued his Decision finding violations in many respects as alleged in the Consolidated Complaint.

However, on the basis of the Board's recent decision in *Guard Publishing Co. dba Register Guard,* 351 NLRB 1110 (2007), the ALJ declined to find violations with respect to three instances involving the alleged disparate application of Respondent's no solicitation/no distribution rule in violation of Section 8(a)(1) of the Act, one instance of discriminatory discipline issued pursuant to said rule in violation of Section 8(a)(3) of the Act, and Respondent's discriminatory repromulgation in September 2007, of a previously unenforced rule prohibiting non-employee access to its break rooms and hallways in violation of Section 8(a)(1) of the Act.[1]

## II. RESPONDENT DISPARATELY APPLIED ITS NO-SOLICITATION/ NO-DISTRIBUTION RULE WITHIN THE MEANING OF *REGISTER GUARD.*

Complaint subparagraph 7(a) alleged that in April 2007, Respondent selectively and disparately enforced a rule prohibiting non-work related solicitation and distribution in working areas during working hours by telling employees they were required to go to non-work areas during non-work times to discuss the union. The ALJ found that this allegation was factually true, i.e., that Supervisor Bezuidenhout stopped Nurse Zubal from engaging in union solicitation in a hallway during working hours and told her she preferred her to talk about the Union in the break room on her break. ALJD 3: ll. 41-49. Complaint subparagraph 7(b) alleged that Respondent disciplined Nurses Avalos and Clark for violating the same rule when they engaged in union solicitation and distribution in working areas. Respondent admitted it took this action. ALJD 6: ll. 20-28.

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[1] General Counsel does not except to the ALJ's finding that the September 2007 incident alleged in the Consolidated Complaint to constitute unlawful surveillance did not violate the Act. ALJD 14: ll. 14-26/

Complaint subparagraph 7(c) alleged that Supervisor Chambers told Nurse Moritz and others they could not distribute Union materials in the hospital hallway or discuss the Union while allowing solicitation and distribution of non-union material. The ALJ found that the evidence supported the allegations of the Complaint. ALJD 7: l. 35 to 8: l. 2.

With respect to these allegations, the ALJ found that nurses regularly discussed non-work subjects during working hours, employees solicited other employees to purchase such items as Christmas cookies, nurses brought information into the hospitals concerning fundraisers for their children's schools and other organizations (which the ALJ assumed to be organizations like the Boy Scouts, Girl Scouts, and "team sports leagues." ALJD 4: fn. 4) their children were involved with, and that Respondent did not enforce its rule consistently up to June 20, 2007. ALJD 4: ll. 1-8. With respect to Nurses Avalos and Clark, Respondent admitted that "in the past, enforcement of that policy has been lax . . ." ALJD 6: ll. 30-34. The ALJ found that Supervisor Chambers told Moritz she could not pass out union literature and had been told to stop all union activities. ALJD 7: ll. 39-44 and fn. 13.

However, the ALJ dismissed these allegations based on his reading of *Register Guard*. In so doing, he concluded that the solicitations and distributions allowed by Respondent were "somehow different than solicitations for a union" and were not "like or similar" as set forth in *Register Guard*. ALJD 5: ll. 47-52; 7: 1-5; 8: 10-12.

General Counsel respectfully disagrees. Organizational solicitations for schools and sports leagues are of a like or similar character to union solicitation. Both involve non-charitable, organizational solicitations. *Register Guard* holds that unlawful discrimination consists of "disparate treatment of activities or communications of a

similar character" because of their union or Section 7 status. 351 NLRB at 1118. The Board stated that an employer could not draw lines on Section 7 grounds but could on a non-Section 7 basis.

> That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.

*Ibid.* Here, Respondent permitted organizational solicitations (schools and team sports leagues are not charities). In these cases employees solicited on behalf of organizations, and Respondent did not enforce its rule against such organizational solicitations. Union solicitations also involve organizational solicitations. The ALJ erred in finding that solicitations for organizations that employees' children participate in are of a different character than union solicitations. Both involve organizational solicitation. Accordingly, under *Register Guard,* Respondent has disparately and selectively enforced its rule on Section 7 lines and has, therefore, violated Section 8(a)(1) of the Act.

## III. RESPONDENT'S DISCIPLINE OF AVALOS AND CLARK WAS DUE TO THEIR UNION ACTIVITES AND VIOLATED SECTION 8(a)(3).

The written warning given to Avalos and Clark for their union solicitations and distributions in June 2007 not only violated Section 8(a)(1) but also Section 8(a)(3) of the Act. The discipline specifically states that it was given because of these protected, union activities. GC Exhs. 9 and 11; ALJD 6: ll. 22-28. (The matters discussed were Union matters and the materials handed out were Union materials. ALJD 6: ll. 13-18.) The ALJ

dismissed this allegation because "there is no evidence of anti-union animus." ALJD 7: ll. 24-29. However, the unlawful disparate application of Respondent's rule constitutes union animus, so if the ALJ erred in concluding that the disparities herein were of a dissimilar character, he *ipso facto* erred in concluding there was no union animus. Moreover, evidence of union animus is not required where Respondent admits its discipline was issued because of protected union activities. See, e.g., *Felix Industries*, 331 NLRB 144, 146 (2000); *Neff Perkins Co.*, 315 NLRB 1229 fn. 2 (1994). In this case, Respondent has admitted it disciplined the two nurses because they engaged in union solicitation and distribution. General Counsel respectfully submits the evidence herein has established a violation of Section 8(a)(3) of the Act.

## IV. RESPONDENT VIOLATED SECTION 8(a)(1) WHEN IT REPROMULGATED AND APPLIED ITS NON-EMPLOYEE NO ACCESS RULE BECAUSE OF INCREASED UNION ACTIVITY.

Complaint subparagraphs 9(a)-(c) alleged that on September 24, 2007, Respondent reissued a rule that prohibits non-employees from conducting meetings on Respondent's premises and enforced the rule in a selective and disparate manner against Union representatives, thereby restraining and coercing employees in the exercise of their Section 7 rights. The ALJ found that, before at least August 2007, Respondent, with the knowledge of its supervisors, permitted Union representatives in break rooms and nurses' stations throughout its hospital facilities but that, in August and September 2007, began to enforce this non-employee no-access policy toward the Union.[2] ALJD 12: 39-42. The ALJ further found that Respondent permitted and continued to permit access from family

[2] Respondent introduced evidence of the rule's existence and enforcement prior to the Union's election and certification in September 2006. ALJD 10: ll. 16-21.

and friends of its employees even though they were non-employees. ALJD 12: ll. 7-10. However, the evidence did not show that non-employees from other organizations were permitted to visit break rooms and nurses' stations, and there was evidence that non-employee vendors had been denied access in the past. ALJD 12: ll. 10-12.

The ALJ concluded that "family and friends" were of a dissimilar character than Union representatives and, under *Register Guard,* discrimination had not been shown. ALJD 13: ll. 7-11. General Counsel respectfully submits that the ALJ's legal conclusions are wrong. In *NLRB v. Babcock & Wilcox,* 351 U.S. 105, 112-113 (1956), and *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992), the Supreme Court established the general rule that an employer cannot be compelled to permit union agents on its property. The Court, however, recognized two exceptions to this rule, the "inaccessibility exception" and the "discrimination exception." *Salmon Run Shopping Center,* 348 NLRB 658, 658 (2006). This "discrimination exception" can arise in two ways: discriminatory enforcement of a rule or promulgation of a rule in order to interfere with employees' rights to self-organization. The Board has long recognized that "an otherwise valid rule violates the Act when it is promulgated to interfere with the employee right to self-organization." See, e.g., *Harry M. Stevens, Inc,* 277 NLRB 276, 276 (1985); *Woodview Rehabilitation Center,* 265 NLRB 838 (1982) (employer's implementation of facially-valid rule in response to and to defeat union activity unlawful); *North Hills Office Services,* 346 NLRB No. 96 (2006). It is similarly unlawful for an employer to repromulgate a rule that was not previously enforced as a response to union or other Section 7 activity. See *Jordan Marsh Stores Corporation,* 317 NLRB No. 74 (1995); *Montgomery Ward & Co., Inc.,* 198 NLRB 52, 62 (1972). The Board recognized this rule in *Register Guard,* where

it stated that "if the evidence showed that the employer's motive for the line-drawing was antiunion, then the action would be unlawful." 351 NLRB at 1118, fn. 18.

General Counsel submits Respondent repromulgated its non-employee no-access rule, which had previously not been enforced against Union representatives, with an antiunion motive in response to increased Union efforts to obtain an initial collective-bargaining agreement. The ALJ found that, prior to August 2007, "Respondent, with the knowledge of its supervisors, permitted the presence of CNA representatives in break rooms and nurses' stations throughout its hospital facilities." He further found that, beginning in August or September 2007, "Respondent began to enforce its non-employee access policy toward CNA." ALJD 12: 39-42. The ALJ erred, however, in stating it did not matter if Respondent began enforcement of the rule "in response to CNA's increased efforts to secure a collective-bargaining agreement" (ALJD 12; l. 44 to 13: l. 1) because he believed that the new definition of discrimination set forth in *Register Guard* controlled. However, as the above quote from *Register Guard* establishes, it does matter. If the rule were repromulgated because of increased Union efforts to secure a contract, or enforced after a lengthy period of non-enforcement, as was the case herein, i.e., if Respondent's motive was antiunion, the action is unlawful. *Register Guard, supra* at 1118, fn. 18.

Because the ALJ based his conclusion on his interpretation of *Register Guard*, he did not specifically find that Respondent repromulgated the rule because of union activity but only assumed it *arguendo*. General Counsel respectfully submits that, under the analysis utilized in *Harry M. Stevens, Inc., supra*, he has established that Respondent acted with an antiunion motivation. The evidence established increased union activity

beginning in mid-August 2007, when the Union gave notice of its intent to engage in a one-day strike in support of its bargaining position and, later, on August 31, engaged in the first one-day strike, followed by another in early October. GC Exh. 13. As the ALJ found, Respondent began to enforce its dormant rule against Union representatives and officially re-promulgated it on September 24, 2007. GC Exhs. 14, 15. General Counsel has thus established a prima facie case of a violation, and Respondent has failed to rebut that prima facie case. Respondent never asserted a legitimate business reason at the trial herein for the repromulgated rule but, instead, contended that the rule had always existed and had always been enforced when its supervisors were aware of the presence of Union representatives. However, the ALJ discredited all of Respondent's testimony to this effect and found that the rule had not been enforced. Thus, Respondent has not rebutted the prima facie case of violation. Moreover, the ALJ's discrediting of Respondent's articulated defense is strong evidence of unlawful motivation. See *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enf'd 705 F.2d 799 (6th Cir. 1982). General Counsel respectfully requests that the Board find that the no-access rule's repromulgation was motivated by increased Union activity.

The General Counsel submits that, properly viewed, Respondent drew its lines with respect to its non-employee no access policy along Section 7 lines. Prior to the repromulgation and enforcement thereof, Respondent treated Union representatives the same as "family and friends" and permitted both groups to visit nurses in break rooms and at nurses' stations, as distinguished from its treatment of commercial vendors, for whom it always prohibited access. After the repromulgation, Respondent made a

decision that affected only Union representatives; it took them from the favored group of "family and friends" and moved them into the disfavored group with commercial vendors. By taking action that affected only Union representatives seeking to meet with employees regarding collective-bargaining issues, Respondent necessarily drew lines along Section 7 grounds. Thus, under *Register Guard,* Respondent's action was unlawful.

As discussed above, General Counsel submits that Respondent repromulgated its no access rule with an antiunion motivation and said repromulgation is, therefore, unlawful for that reason as well. Although the *Babcock* discrimination exception has thus far been invoked only with regard to the denial of union access while granting access to other groups ("discriminatory enforcement" of a no-access rule), General Counsel respectfully submits it should apply to an employer's implementation of a no-access rule with a discriminatory object as well ("discriminatory promulgation" of rule). Both types of conduct constitute discriminatory assertions of property rights to interfere with Section 7 activity. The Board has long held that an employer's implementation of an otherwise valid rule limiting employee solicitation activities, if motivated by a discriminatory purpose of inhibiting union activity, violates the Act.[3]

Neither the Supreme Court nor the Board has rejected the argument that an employer's denial of access to non-employee union agents, with a discriminatory purpose in the absence of disparate treatment, is unlawful. *Babcock* and *Lechmere* did not present this question; in both cases, the employers had rules in place prohibiting outsider solicitation long before the advent of any union activity. The Court's decision to except,

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[3] See discussion *supra.*

and in essence invalidate, non-employee access rules that "discriminate against union solicitation" can be read as an admonition that employers cannot by any means deny access to non-employees on the basis of their union activities. Although the Board has not specifically addressed this issue, the Board's analysis regarding discriminatorily-promulgated employee no-solicitation rules similarly would apply to discriminatorily motivated denials of access to non-employees engaged in Section 7 activity.[4]

Further support for the validity of a "discriminatory motive" theory of violation with regard to non-employee access can be found in *Babcock's* dual conclusions that "[t]he employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization."[5] Thus, in *Babcock* (and, subsequently, in *Lechmere*), the question was whether an employer would be required to permit access to non-employee union organizers, because of their affirmative rights granted by the NLRA, when the employer had not and would not otherwise permit access by outsiders. The Court held that there was no such requirement, absent the inaccessibility of employees that would render ineffective reasonable attempts to communicate with them through other channels. *Babcock* left undisturbed, and indeed reiterated, the principle that an employer may not affirmatively interfere with organizational rights by singling out those activities for discriminatory treatment. The Court did not distinguish, in this regard, between "derivative" non-employee Section 7 conduct and "direct" Section 7 activity

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[4] Indeed, in *Nashville Plastic Products*, 313 NLRB 462 (1993), the Board found unlawful the discriminatory promulgation of a rule, allegedly prohibiting all access by off-duty employees, in response to union handbilling and with the purpose of restraining Section 7 rights. The employer had asserted that the off-duty employees should be considered non-employees subject to *Lechmere*. Although the Board rejected that contention, its discriminatory promulgation analysis proceeded, and did not depend upon, the determination that off-duty employees were "employees" not subject to the *Lechmere* rubric.

[5] 351 U.S. at 112.

engaged in by employees. *Lechmere* validated an employer's assertion of its property rights as a shield against the derivative Section 7 rights which non-employee organizers had asserted should permit them special access. *Lechmere* did not uphold an employer's use of property rights as a sword to discriminatorily proscribe Section 7 activity by non-employees on its premises.

## V. CONCLUSION

For the reasons stated above, General Counsel respectfully urges the Board to grants his exceptions filed herein and find that Respondent committed said additional violations of the Act and remedy them accordingly.

Dated at San Francisco, California, this 19th day of March, 2009.

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FORM NLRB-877
(4-84)

# UNITED STATES OF AMERICA
# BEFORE THE NATIONAL LABOR RELATIONS BOARD

| | |
|---|---|
| THE FREMONT-RIDEOUT HEALTH GROUP d/b/a FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL<br><br>THE FREMONT-RIDEOUT HEALTH GROUP d/b/a FREMONT-RIDEOUT HOME HEALTH<br><br>and<br><br>CALIFORNIA NURSES ASSOCIATION, AFL-CIO | Cases 20-CA-33521<br>20-CA-33649<br>20-CA-33801<br>20-CA-34017 |
| | DATE OF MAILING March 19, 2009 |

**AFFIDAVIT OF SERVICE OF** GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE and GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by facsimile upon the following persons, with their permission, directed to them at the following fax numbers:

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| | |
|---|---|
| Subscribed and sworn to before me on<br><br>March 19, 2009 | DESIGNATED AGENT<br>Susie Lowe<br>NATIONAL LABOR RELATIONS BOARD |

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 20**

| | |
|---|---|
| **CL FRANK MANAGEMENT, LLC d/b/a HOTEL FRANK, and CL METROPOLIS MANAGEMENT, LLC, d/b/a HOTEL METROPOLIS**<br><br>**and**<br><br>**UNITE HERE! Local 2** | Case Nos. 20-CA-35123<br>20-CA-35223<br>20-CA-35238<br>20-CA-35253<br>(Consolidated) |

## PROOF OF SERVICE

Case Names: Providence/Hotel Project Group d/b/a Frank Hotel
Provenance d/b/a Hotel Frank
Provenance d/b/a Hotel Frank
Provenance d/b/a Hotel Metropolis

Case Nos.: 20-CA-35123
20-CA-35238
20-CA-35253
20-CA-35223

I, Jamie Fensterstock, declare that I am employed with the law firm of Jackson Lewis LLP, whose address is 1655 West Broadway, 9th Floor, San Diego, California 92101; I am over the age of eighteen (18) years and am not a party to this action.

On September 23, 2011, I served the attached ***Respondent's Opposition To General Counsel's Motion To Strike*** in this action as follows:

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**[X] BY ELECTRONIC MAIL (EMAIL): I attached a full, virus-free pdf version of the document to electronic correspondence (e-mail) and transmitted the document from my own e-mail address, fensterj@jacksonlewis.com, to the persons at the e-mail addresses above. There was no report of any error or delay in the transmission of the e-mail.**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 23, 2011 at San Diego, California.

Jamie Fensterstock

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